CHOO CHIN LOI

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[CRIMINAL APPEAL NO: 42-01-2001]
14 JUNE 2001

EVIDENCE: *Proof of - Statutory rape - Whether medical evidence that accused was the father of baby born to victim subsequent to alleged offence could be relied upon - Whether defence evidence that accused was impotent sufficiently rebutted - Whether ingredient of penetration for offence of rape established*

EVIDENCE: *Proof of - Statutory rape - Semi-flaccid penis - Whether penetration proved - Whether offence of rape established*

The accused was convicted and sentenced of two charges of statutory rape against an under aged girl ('the victim') in the lower court. At the time of the offence, the accused was 68 years old and the victim was under 16 years of age. The accused appealed against his conviction and sentence.

The issues were: (1) whether the evidence that the accused was the father of the baby born subsequent to the sexual intercourse was proved; (2) whether the medical evidence that the accused could not achieve an erection of his private part was disregarded by the lower court; and (3) whether it was proved that the accused's private part which was semi-flaccid at the time of the alleged sexual intercourse could have caused penetration so as to establish the offence of rape.

Held:

[1] The evidence that was sought to establish that the accused was the biological father of the baby which the victim gave birth to could not be relied upon since the blood (upon which the evidence was based after various tests were conducted) was not proven beyond reasonable doubt to belong to the accused. The possibility existed that there might be a mix up and that it could be tampered with.

[2] The lower court was dealing with a case of a semi-flaccid penis and it was important that the prosecution establish that a semi-flaccid penis could be regarded as an erected penis so as to enable the accused to engage in sexual intercourse. But the prosecution did not question the two doctors

who had examined and conducted tests on the accused in that regard. In the end, the lower court took it upon itself to venture what could only be termed as a guess and to conclude that a semi-flaccid penis could cause penetration.

[3] Though there was evidence to show that the victim had an old hymen tear which supported the conclusion that the vagina was penetrated, that evidence could not dispel the doubt created by the defence evidence that the accused was impotent and therefore incapable of causing penetration. That doubt would not have arisen had it been proved beyond reasonable doubt that the accused was the biological father of the baby.

[4] The conviction was unsafe. There was a doubt as to the accused's ability to achieve an erection which was a necessary ingredient for penetration for the offence of rape to be established.

[Conviction and sentence set aside; accused discharged and acquitted.]

For the appellant - Anthony Tai
For the respondent - Marutin Pagan

Reported by Usha Thiagarajah

JUDGMENT

Ian HC Chin J:

Introduction

Choo Chin Loi ("the accused") was on 3 January 2001 convicted of two charges of statutory rape against a girl whose name I will not reproduce but whom I will refer to as the victim. The offences were alleged to have taken place in a house, one offence in February 1996 and the other between February and March 1996 when the victim was under 16 years of age. The accused was then 68 years old. The accused was sentenced to five years' imprisonment for each of the offence but to run concurrently. The accused appealed against the decisions.

Grounds Of Appeal

The first ground of appeal concerns the reception of the evidence of Lim Kong Boon. His findings are no longer challenged but it was contended that there is a break in the chain of evidence concerning the samples giving rise to a doubt as to whether the samples he examined were taken from the persons concerned, including that allegedly taken from the accused. Inspector Norfidah bt Mohamaed gave evidence that on 3 December 1996 she was in the

laboratory of the Sarawak General Hospital where upon her request blood sample was taken from the accused by someone in the laboratory. She testified that the tube which was to contain the sample was first affixed with a label written by that person with particulars of the name and age of the accused. She also explained that because of an error on the first label another one was written and then superimposed on the first one. She saw the blood taken from the accused being emptied into the labeled tube and that it was afterwards put into a refrigerator. She cannot recall the name of that person and that person was not called to testify. Mr. Anthony Tai, learned counsel for the accused, contended that the person was vital if there is not to be a break in the chain of evidence. Whether it is vital or crucial depends on whether there is other evidence that the accused had sexual intercourse with the girl since the fact that the accused is the father of the baby that was born subsequent to the sexual intercourse is but one of the other way of establishing sexual intercourse (but taking into account the possibility of artificial insemination which we can rule out in this case since there is no evidence to support that). As for the handling of the blood sample taken from the accused Inspector Norfidah did not say what happened to it after she left the hospital. Did she take it with her? Did it remain in the refrigerator of the hospital laboratory where she saw it being put inside? What happened to the sample from the time it was put in the refrigerator to the time it was taken out? From where did she get the sample to pack on the 5 December 1996? There are no answers to those questions. On the same day, that is 3 December 1996, sample of blood was also taken from the baby. Those samples face the same questions and the same lack of answers. Inspector Norfidah's identification of the samples in court are suspect because she did not even narrate the fact that in two of the tubes containing the samples, an additional label was superimposed on another one until she was cross-examined following an examination of the exhibits. It was only then that she offered the explanation that there was an error made in the labels that were first affixed requiring the affixation of another one. Therefore, the evidence of Lim Kong Boon that the accused is the biological father of the baby which the victim gave birth to cannot be relied on since the blood (upon which he based his conclusion after conducting various tests) had not been proven beyond reasonable doubt to belong to the accused. The possibility exists that there may be a mix-up and that it could be tampered with. The fact that the accused is the biological father would have been very strong corroborative evidence. This leads me to consider other evidence of the sexual intercourse.

The victim testified that on two occasions after the Chinese New Year in 1996, the accused had come to the house where she was staying and when her adopted father was out. The victim's adopted mother left her when she was studying in Primary 3. She described how the accused had undressed her, laid

on top of her, how the accused's private part entered hers and how she felt wet though there was no ejaculation from the accused. Though she was a virgin at the first intercourse, there was no bleeding and no pain. She said the accused private part was semi-erect, meaning partially soft but that it could penetrate her. She was at that time 15 1/2 years old and she gave evidence of those incidents some four years later. Against that evidence, the two doctors, Dr Sukumaran s/o Ramachandran and Dr Mohamad Hanafiah Shamsuddin, who had examined and conducted tests on the accused (after being taken to see them by the police) respectively on 1 and 6 August 1996 gave evidence that the accused could not achieve any erection of his private part despite various stimulation. The doctors were not asked whether a semi-flaccid penis can penetrate the vagina of a virgin and why, if there was penetration, there was no bleeding. Despite the absence of such evidence, which must necessarily come from experts like doctors, the lower court disregarded the potency tests conducted by the prosecution and went on to conclude as follows:

> It is in evidence that the accused could not achieve erection in two potency tests conducted upon him and that his male organ was semi-flaccid at the time of the sexual (intercourse). Does it render it impossible for the accused to achieve penetration? I do not think so. While a semi-flaccid male member may not penetrate deeply, (as it does with) a fully erected male organ, (it) would not prevent it from achieving some degree of penetration. In law to constitute rape, mere (penetration) is sufficient. The victim was unshaken under (cross-examination) and she maintained that the accused's male member had penetrated her private part. It is reasonable to assume that it is precisely because the accused's male organ was semi soft he had to exert great force to penetrate and I believe that was the reason why the victim did not bleed or suffer any pain in her first sexual (intercourse).

Dr Sukumaran had said that you must have an erected penis before you can engage in sexual intercourse. He also said that impotency means inability to achieve an erection. But the lower court was dealing with a case of a semi-flaccid penis and it is important that the prosecution establish that a semi-flaccid penis, whatever that means, can be regarded as an erected penis so as to enable the accused to engage in sexual intercourse. But the prosecution did not bother to question the two doctors in this regard. In the end the lower court took upon itself to venture, what can only be termed as, a guess, and to conclude that a semi-flaccid penis can cause penetration. The lower court was also guessing when it said that penetration was achieved by using great force to push the semi-flaccid penis into the vagina. The doctors should have been asked whether this was possible.

Though we have the evidence of Dr. Johnnieson Jong who examined the victim in July 1996, some five months after the alleged sexual intercourse, that the victim has an old hymen tear which supports the conclusion that the vagina was penetrated, this evidence could not dispel the doubt created by the defence evidence that the accused was impotent and therefore incapable of causing the penetration. This doubt would not have arisen had it been proven beyond reasonable doubt that the accused is the biological father of the baby and that the pregnancy could not be caused by an ejaculation outside the vagina. All these, as mentioned earlier, evidence of the experts, though they gave evidence, had not been elicited from them. Unfortunately also, as mentioned earlier, there was a couple of links missing in the chain of custody of the blood samples taken from the accused.

Conclusion

Given the circumstances I have discussed, the conviction is unsafe. There is a doubt as to the accused's ability to achieve an erection which is, according to the medical evidence of this case, necessary for penetration, an ingredient for the offence of rape. The conviction and sentence handed down by the lower court on 3 January 2001 is therefore set aside. Instead, the accused is discharged and acquitted.